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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

vs.

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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PETITIONER'S BRIEF.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit (R. 59) is reported at 300 F. 2d 222. The opinion of the District Court for the Southern District of New York (R. 46) is reported at 200 F. Supp. 484.

Jurisdiction.

The judgment of the court of appeals was entered on January 12, 1962 (R. 83). The petition for a writ of certiorari was filed on April 11, 1962 and was granted on June 11, 1962 (R. 88). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Statute Involved.

Petitioner National Maritime Union of America, AFL-CIO (NMU) contends that the Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U. S. C. §§141-187 (LMRA), is applicable to Empresa's maritime operations. Pertinent provisions of the Act are set forth in Appendix A. Also in Appendix A are Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights Between The United States and Honduras, 45 Stat. 2618 (1927), which are cited in the court of appeals' opinion.

Questions Presented.

1. Does a federal district court have original jurisdiction to review and enjoin an NLRB decision directing an election where no showing of violation of constitutional or express statutory rights has been made, and full judicial review of the Board determination may be had in the circuit court after the election under the statutory review procedures of the LMRA, §10(e) and (f) (29 U. S. C. §160(e) and (f))?

2. Does the NLRB have jurisdiction over the Honduran flag vessels of United Fruit Company, which are operated in United States commerce through a wholly owned and controlled Honduran subsidiary as part of a single integrated fleet of American and Honduran flag vessels used to carry United Fruit's own tropical produce to American markets?

Statement of the Case.

This case, *McLeod* v. *Empresa* (No. 93), and *McCulloch* v. *Sociedad* (No. 107), involve identical facts and present

the identical issue as to the NLRB's jurisdiction over foreign flag ships. An additional issue not presented in the other cases is presented here, *i.e.*, whether a federal district court has original jurisdiction to review and enjoin an NLRB decision directing an election in a case of this kind. While the Board refrained from raising this question in its petition for certiorari in No. 91, it reserved the right to argue it.

A petition for certiorari in a fourth identical case, *NMU v. Sociedad* (No. 141), was filed on May 23, 1962 but has not yet been acted upon by the Court.

The issue of Board jurisdiction over foreign flag ships is also presented in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, No. 469, October Term, 1961, in which briefs have already been filed, and which is scheduled for argument with this case.

Parties.

Petitioner NMU (intervenor-defendant below) is an American maritime union comprised of approximately 40,000 unlicensed seamen employed on vessels engaged in commerce on the deep seas and other navigable waters.

Respondent Empresa (plaintiff below) is a Honduran corporation wholly owned and controlled by United Fruit, and holding title to United Fruit's Honduran flag vessels.

The Threat of Flag of Convenience Shipping to the Livelihoods of American Merchant Seamen.

Job opportunities for American merchant seamen have drastically declined since World War II, forcing many who followed the sea as their calling to seek livelihoods elsewhere. Depressed employment conditions have naturally

weakened the strength of American maritime unions in collective bargaining and restricted their bargaining goals.

As is commonly known, the economic plight of the American merchant marine is directly attributable to the relentless competition of modern giant Panlibhon fleets which enjoy the incomparable advantages of cheap labor and exemption from United States taxes. They threaten American flag shipping with near extinction.

Since Panama, Liberia and Honduras are the favorite countries for convenience registry, the word Panlibhon has been coined to denote convenience shipping the world over. Available statistics show a continuous decline in employment on American flag ships from 158,860 in 1945 to 49,281 in 1960 (Note, "Panlibhon Registration of American Owned Merchant Ships," 60 *Columbia L. R.* 711, 712, n. 13 (1960); *Hearings On Vessel Transfer, Trade-In, etc., Before Committee On Merchant Marine*, H. R., at p. 715, 85th Cong., 1st Sess. (1957)); and a corresponding increase in tonnage of Panlibhon vessels from 1,745,048 gross tons in 1950 to 6,388,000 gross tons ten years later (Note, "The Flag Of Convenience Fleet," 69 *Yale L. J.* 498, 499, nn. 6, 8 (1960)). Savings in labor costs and taxes are generally conceded to be the factors behind the growth in Panlibhon fleets (Note, *op. cit.*, 60 *Columbia L. R.* at 715). This Court took cognizance of the phenomenon in *Lauritzen* v. *Larsen*, 345 U. S. 571, 587 (1953):

> "... it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them."

The impact of foreign registration is reflected in the percentage decline of United States oceanborne foreign trade carried in American bottoms from 49.2% in 1951 to 10.5% in 1960 (*Analysis of Participation of U. S. And Foreign Flag Ships In Oceanborne Foreign Trade in United States, 1937, 1938, 1951-60;* U. S. Department of Commerce, Maritime Administration, 1962, at pp. 6-7). In contrast, in 1960 almost 40% of our foreign trade was transported in ships of Panlibhon registry (*ibid.*, at p. 4).

An equally dismaying aspect of the trend is that the newest and most modern commercial vessels being built by American interests are being launched under Panlibhon flags. Thus, the American tanker fleet, which now ranks but fourth in the world, is composed of ships between fifteen and twenty years old, while only 21% of the total fleet is under five years old. In contrast, 57% of the Liberian tanker fleet is under five years old, while only 10% is between fifteen and twenty years old. As a result of recent technological improvements in the construction of tankers, a tanker over fifteen years of age is generally considered to be obsolete for oceanborne transport (OEEC, *Maritime Transport 1960*, May 2, 1961, at p. 53).

The wages of American union seamen are the highest in the world, and their working conditions are the finest. They are also the beneficiaries of industry-supported pension, welfare, vacation, and employment security programs providing fringe benefits unequaled by seamen of any other nation. It has been estimated, for example, that the daily manning cost of a T-2 type tanker of 16,500 deadweight tons is $1200 under United States flag, and only $280 under foreign flag (*Hearings on Vessel Transfer, Trade-In, etc., before Committee on Merchant Marine*, H. R., at pp. 51, 57, 85th Cong., 1st Sess., 1957).

The precarious state to which Panlibhon competition has reduced American flag shipping is nowhere better illustrated than in this case. For here, as we shall see, an American company is operating a large integrated fleet of vessels comprised of both Honduran and American flag ships. The vessels are used interchangeably regardless of flag in the identical trade, and it is otherwise impossible to distinguish the operations of one from the other with the single qualification that the wages of crewmembers on the Honduran flag vessels are a fraction of the wages of their fellow seamen on American flag vessels. It requires no great insight into the economics of the maritime industry to appreciate the advantages of operating under Honduran flag.

To save their livelihoods, America's merchant seamen, through their maritime unions, have been compelled to attempt to organize Panlibhon shipping. Their objective is to improve job conditions on Panlibhon ships and thereby lessen the depressing effects on American flag ships. If the disparity between American and Panlibhon wages can be reasonably reduced, foreign flag registry may no longer be so attractive to American shipping interests.

The maritime unions have limited their organizing efforts to shipping operations which are essentially United States enterprises. They have no intention of seeking to organize vessels flying the flags of traditional maritime nations such as England, France, Norway, Belgium, Holland, etc., where the shipping possesses a genuine foreign character or is not simply the "adjunct of a domestic corporation's operations in the international trade of the United States, and, thus . . . the shipping of this nation" (R. 12).

The Operations of United Fruit and Empresa in United States Commerce.

Following a lengthy hearing in which the shipping activities of United Fruit and Empresa were extensively explored, the NLRB concluded that the enterprise was essentially that of a domestic company in the foreign trade of the United States and therefore within the coverage of the LMRA. The witnesses on whose testimony the Board relied were all employees or officers of United Fruit.

United Fruit is an American company with diverse world-wide interests; it is largely owned by American stockholders (R. 12). Its main concern, however, is with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale (R. 12). The bulk of its trade is between Central and South American ports and United States ports. It carries its produce in ships it either owns or charters, including those involved in this case (R. 12).

United Fruit in part conducts its operations through some fifty to sixty wholly owned subsidiaries, of which Empresa is one (R. 12). Unlike many holding companies, United Fruit is also an operating company and exercises close supervision and control over the activities of its subsidiaries (R. 13). Expansion, contraction or other changes in the operations of the subsidiaries are determined by United Fruit based not on the needs of the subsidiaries for advancement as independent enterprises, but rather on United Fruit's overall business requirements in the production, transportation and sale of tropical produce (R. 13).

Thus United Fruit formed Empresa in 1941 as the nominal titleholder of its Honduran flag ships (R. 13). The entire capital for the venture, including a number of

vessels already built, was furnished by United Fruit, which elects all directors of Empresa, who in turn appoint all officers of Empresa (R. 13; S. M.[1] 154, 356, 463, 495).

From the time of its formation, Empresa has never operated the vessels which it nominally owns, or which are nominally owned by another United Fruit subsidiary and assigned to Empresa as "managing agent" (R. 13-15). There were seventeen such vessels at the time of the Board hearing (R. 13), but the complaint alleges that there are now only thirteen (R. 1). The vessels have never carried either cargo or passengers on Empresa's own account, nor does Empresa hold the vessels out in the world charter market as available for hire (R. 2, 13-14).

On the contrary, since its formation, Empresa's business has been limited to time chartering its vessels to United Fruit, and Empresa's income derives solely from charter fees paid to it by United Fruit (R. 13). A time charter is an arrangement for leasing a vessel together with captain, crew, food stores, equipment and all property attested to in its classification certificate (S. M. 187). The time charterer (United Fruit) determines what to do with the vessels (S. M. 189).

United Fruit uses the vessels it time charters from Empresa to carry its own tropical produce, and the vessels regularly call at United States ports on voyages from Central or South American countries (R. 15). United Fruit determines what voyages the vessels shall make, their ports of call, their length of stay in various ports, and what cargoes they shall carry. In exercising these functions, United Fruit deals directly with the masters of the vessels (R. 14). In the course of a voyage, the master maintains

[1] The reference S. M. is to the transcript of the NLRB hearing which is part of the unprinted record in *McCulloch* v. *Sociedad*, No. 107.

constant communication with United Fruit's marine department, receiving instructions and making reports (S. M. 224-226).

Supplies for both United Fruit's Honduran and American flag vessels are purchased in this country from Maratrop Trading Corporation, another wholly owned United Fruit subsidiary (R. 14, n. 14). Honduran and American flag vessels are usually dry docked and repaired in the United States, and decisions as to capital improvements for the vessels or the purchasing of new vessels and the scrapping of old ones are made by United Fruit (R. 14, n. 13). United Fruit, of course, advances the funds for the acquisition of new vessels by Empresa (S. M. 115, 116, 463). Empresa's capital expenditures and other substantial changes in operation are determined by United Fruit, based on United Fruit's needs for waterborne transportation both present and projected (R. 15). In short, the size of Empresa's fleet at any time is determined by United Fruit.

Approximately 60% of the officer personnel on the vessels reside in the United States and many are American citizens (S. M. 583, Empresa Ex. 25A-O).[2]

While Empresa alleges in its complaint (R. 4), and the court below repeated (R. 60), that all but one of the unlicensed crewmembers is a citizen of Honduras, the record of the Board hearings shows that more than 5%, and perhaps as many as 10% of the unlicensed crew complement are either American citizens or resident aliens (S. M. 583, Empresa Ex. 25A-O).[3] From time to time unli-

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[2] All references to exhibits are to exhibits in the Board hearing, none of which is printed.

[3] Sociedad's complaint in Case No. 107 (at p. 2 of the record) contains the qualified allegation that "all of the seamen *supplied to Empresa by Sociedad* are citizens of Honduras except one. . . ." (italics added).

censed crewmembers are hired in the United States (S. M. 428, Empresa Ex. 15A-D). The plaintiff in *Zieliuski* v. *Empresa Hondurena de Vapores*, 113 F. Supp. 93 (1953), was hired in the United States.

In addition to the Empresa vessels, United Fruit operates a fleet of approximately twenty ships under American flag (R. 15, S. M. 192), employing some eight hundred unlicensed seamen (S. M. 184, United Fruit Ex. 10). For many years a collective bargaining agreement has been in effect between United Fruit and NMU governing the terms and conditions of employment of these seamen (S. M. 179-180). Their wages are substantially higher than the wages of the seamen working on United Fruit's Honduran flag ships (S. M. 617, 618).

The operations of the Honduran and American flag vessels are fully integrated (R. 15). All vessels function under the control of United Fruit's marine division which uses them interchangeably to carry the same types of cargo and call at the same domestic and foreign ports (R. 15). In determining which vessel to assign to a particular run, the marine division bases its decision on availability, size and speed, and not on the flag or nominal ownership of the vessel (R. 15).

United Fruit's marine division solicits general cargo business for all vessels without distinction as to flag (S. M. 89). Scheduling of runs is controlled by the marine division, which fixes the destination, departure and arrival times for all vessels (S. M. 89, 98, 99, 212, 213). All vessels operate in the same trade routes and use the same dock and terminal facilities (S. M. 140, 141, 161, 183, 184, 251, 254; United Fruit Ex. 6G; NMU Ex. 4). Cargo and passenger

rates, which are set by the marine division, are the same for all vessels (S. M. 96, 97).

In annual reports to its shareholders, United Fruit refers to the vessels involved in this case as its own, and even points out that certain of them have been built to its own specifications. Nothing in the reports indicates that United Fruit considers the vessels to be other than its own or to be otherwise than completely under its control (R. 16, n. 18).

United Fruit complies with section 801 of the Merchant Shipping Act (46 U. S. C. 1220) which requires American companies to file detailed annual financial and operating reports with the United States Maritime Commission. United Fruit includes in its reports full details concerning the vessels involved in this case (S. M. 631-633, 638, 659).

During World War II, the United States War Shipping Administration requisitioned the Empresa vessels for war service (S. M. 80, 81, 280, 327-328).

On the basis of these and other facts, the Board concluded that "Empresa's maritime operations are a part of a single integrated maritime operation under the continuous direct control and either direct or ultimate ownership of United Fruit and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation" (R. 16). The Board further observed that "the relationship between United Fruit and Empresa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market.... Empresa's vessels are utilized by United Fruit as an integral and necessary part of its fleet of vessels and not

chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise" (R. 15-16). In short, Empresa and United Fruit are "joint employers" of the affected crewmembers (R. 16).

The Litigation.

Upon obtaining pledge cards from a majority of the non-officer seamen on Empresa's vessels, NMU filed a petition with the Board seeking an election in the appropriate unit (R. 9). United Fruit and Empresa participated fully in the hearing which followed and in all subsequent stages of the proceeding (R. 9-10). After the close of the hearing but before rendering its decision, the Board served notice on Sociedad, a Honduran union, inviting it to intervene and state its position. Receiving no reply to the notice, the Board concluded that Sociedad was not interested in being a party to the proceeding (R. 17, n. 22). A claim by Empresa that its contract with Sociedad was a bar to the proceeding was rejected by the Board, since the contract expired before the Board issued its decision (R. 17, n. 23).

Meanwhile, after the close of the hearing but again before the Board's decision, another Honduran union, Sindimar, requested and was granted the right to intervene and to be placed on the ballot (R. 17, n. 22).

Following issuance of its decision on November 15, 1961 (R. 9), extensive election preparations, in which Empresa and United Fruit participated, were undertaken by the Board. Arrangements were made for the election to begin on December 17 and continue through January 31, 1962 upon arrival of Empresa vessels in United States ports. Those employees who were not afforded

an opportunity to vote in this manner would receive a mail ballot (R. 47).

In the late afternoon of the Thursday (December 14, 1961), Empresa, by order to show cause returnable in the District Court for the Southern District of New York, sought a temporary injunction against the election. NMU, not named as a party to the action, intervened and opposed the application. Sociedad appeared on the return of the motion in support of the application. At approximately the same hour on Saturday, December 16, that Judge Palmieri of the Southern District denied Empresa's motion for a temporary injunction, Sociedad secured an *ex parte* stay of the election from Judge Keech of the District Court for the District of Columbia.

Thereafter, Empresa appealed to the Court of Appeals for the Second Circuit, which reversed Judge Palmieri and granted the application for a temporary injunction (R. 59-82). The Court of Appeals' decision was rendered without benefit of the transcript of the Board hearing, which was not made part of the record by Empresa. Judge Hoitzoff similarly granted Sociedad's application for an injunction in the District of Columbia.

SUMMARY OF ARGUMENT.

Jurisdiction in this action should have been declined at the outset, because NLRB rulings in election cases are not reviewable by district courts except in very limited situations not present here. In upholding district court jurisdiction, the court of appeals stripped the Board of power to determine its own jurisdiction in the entire field of the United States foreign commerce, including shipping, and turned over authority to the district courts of fifty states. This makes a shambles of the congressional pur-

pose to achieve a uniform national labor policy through administration of the LMRA by a single paramount agency.

In overruling the Board and holding that it had no jurisdiction over the maritime operations involved, the Court of Appeals failed to accord to the Board's findings the weight and respect to which they are entitled. After careful review of the record in which it stressed operational facts, the Board concluded that the vessels in question were an integrated phase of United Fruit's American business. The court of appeals, without benefit of the record of the Board hearing, erroneously placed overriding emphasis on the vessels' symbolic and peripheral Honduran contacts, such as the flag and the Honduran nationality of the crew members.

Application of the Act to the vessels is not extraterritorial since the operations are entrenched in the commerce of this nation. Besides, the Act may be applied extraterritorially, the same as our antitrust laws, since Congress' purpose was to minimize burdensome effects on the foreign as well as the domestic commerce of this nation.

Benz v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1958), does not stand for absolute exemption of all foreign flag ships from Board jurisdiction regardless of American connections. By stressing a tramp steamer's temporary and fleeting contacts with an American port, *Benz* supports Board rulings that application of the Act to foreign flag ships is to be determined by case-by-case evaluation of American contacts as compared to foreign contacts.

In determining the jurisdictional reach of the LMRA, the possibility of conflict with Honduran laws is irrelevant, in addition to being remote and inconsequentional. Foreign flag vessels which voluntarily engage in the trade of this nation subject themselves to our laws as they exist. United States' courts should not be intimidated into depriving crew members working for American companies from

vital rights under the LMRA because of vague apprehensions over incurring the displeasure of the Honduran government.

Neither flag law, nor treaty law, nor any other principle of international maritime law, is an obstacle to assertion of Board jurisdiction. The LMRA applies equally to foreign and American employers and employees who carry on business or work in this country.

Coverage under the LMRA will not impugn the Honduran nationality of the Empresa vessels or the right of Honduras to exercise the traditional authority of the flag nation in matters of registration, taxation, requisition, shipboard discipline, etc.

The alternative to Board jurisdiction is chaos, with state and federal district courts throughout the nation applying a multiplicity of variously shaded and conflicting views to the problem of union organizing in the foreign flag shipping field.

POINT I.

The Court of Appeals erred in granting an injunction against the Board election.

A. The district court lacked jurisdiction to entertain this suit.

It is well settled that Board orders in representation proceedings are not reviewable except as they may be drawn into question in unfair labor practice cases under Section 9(d) of the Act. *AFL* v. *National Labor Relations Board*, 308 U. S. 401 (1940).

Independent suits in district courts challenging Board determinations in representation cases have been permitted in only two very limited situations: (1) where a substantial

constitutional question is presented (*Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949); or (2) the Board's ruling is "contrary to a specific prohibition of the Act" (*Leedom* v. *Kyne*, 358 U. S. 184, 188 (1958). *Cf. Milkdrivers Local 98* v. *McCulloch* (D. C. Cir., No. 16695, May 31, 1962, not yet officially reported), 50 LRRM 2322.

Moreover, the right to bring independent suits in this narrow area has been restricted to unions alone, since employers without jeopardy can always under section 9(d) obtain review of unfavorable Board decisions in election cases by refusing to bargain. *Leedom* v. *Int'l Brotherhood of Elec. Wkrs.*, 278 F. 2d 237 (D. C. Cir. 1960); *Atlas Life Ins. Co.* v. *Leedom*, 284 F. 2d 231 (D. C. Cir. 1960); *Reeves* v. *Phillips* (N. D. Ga. No. 7818, Feb. 13, 1962, not officially reported), 49 LRRM 2833; *Lily Tulip Cup Corp.* v. *Leedom* (D. C. No. 1968-59, Aug. 4, 1959, not officially reported) 44 LRRM 2768.

The court of appeals' decision departs from prior cases in two respects: First, it would extend to employers the same right to bring independent suits as unions. (See also that court's most recent case, *Consolidated Edison Co.* v. *McLeod*, 303 F. 2d 354 (2nd Cir. 1962).) A conflict apparently exists between the District of Columbia Circuit and the Second Circuit on this point. *Leedom* v. *Int'l Brotherhood of Elec. Wkrs., supra; Atlas Life Ins. Co.* v. *Leedom, supra.*

Employers and unions were placed on equal footing by the Second Circuit because the court found it conceivable that the union in *Leedom* v. *Kyne* could have precipitated unfair labor practices and obtained review in that manner, and that did not deter this Court from deciding the case. The possibility that the union would have succeeded in fomenting unfair charges in *Leedom* v. *Kyne* was remote and unrealistic. This Court emphasized that the employees

there had "no other means within their control to protect and enforce" the right in issue (358 U. S. at 190).

Professor Henry M. Hart, who in the article, "The Supreme Court, 1958 Term," 73 *Harvard L. R.* 84, 219 (1958), apparently first suggested that unfair practice charges could have been incurred, recognized the unlikelihood. Ordinarily, when an employer refuses to bargain, a union can be counted upon with reasonable certainty to file refusal to bargain charges. The reverse is not true. If a union refuses to bargain, there are few employers who would find cause for complaint. Permitting employers to bring independent suits on the strained view that they stand in the same position as unions ignores the realities of collective bargaining and invites the delays and dilatory tactics which the statutory scheme was designed to prevent. (See the discussion of the legislative history of section 9 of the LMRA in the dissent of Mr. Justice Brennan in *Leedom v. Kyne*, 358 U. S. at 191.)

The second reason the decision of the court below is at odds with earlier cases is that despite the finding that Board action did not involve a violation of either constitutional rights or a "clear statutory command," the court nevertheless upheld the jurisdiction of the district court to review the Board proceedings. It did so by announcing an entirely new exception to the rule against independent suits in representation cases, namely, that district courts may intercede when Board action ramifies into the "field of foreign relations" or has "international aspects" (R. 68-69).

This far reaching exception for "international aspects" is very different from the exceptions permitted in *Fay v. Douds*, *supra*, or *Leedom v. Kyne*, *supra*, where courts intercede to protect existing constitutional or statutory

rights which are plainly in jeopardy. Here the circuit court's test for intercession is not rights to be protected, but rather the subject matter of the controversy before the Board. When "international aspects" are present, the Second Circuit now holds, the Board's primary authority to adjudicate the jurisdictional reach of the Act must yield to the district courts.

This is a drastic and we believe dangerous innovation in the traditional relationship between the Board, an independent administrative agency, and the courts, which has been marked by a policy of non-interference. From the earliest days of the Wagner Act, this Court has required that when proceedings are pending before the Board the administrative processes of the agency must be exhausted before there may be judicial review of the controversy, including questions of jurisdiction, and then such review is allowable only through the appropriate circuit court as provided in section 10(e) or (f) of the Act (29 U. S. C. §160(e) or (f)). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

Under the "international aspects" test, parties dissatified with the way matters are progressing for them before the Board are invited to invoke the intervention of the district courts at almost any intermediate stage of Board proceedings, as Empresa did here.

Every district judge in the nation is thereby made a potential arbiter of Board jurisdiction in the foreign flag field. This will reduce to shambles the basic scheme of the LMRA wherein Congress to achieve a uniform national labor policy created the NLRB as a single paramount administrative or quasi-judicial authority to guide and regulate the development of federal labor law.

In *Amazon Cotton Mill* v. *Textile Workers Union*, 167 F. 2d 183, 185 (4th Cir. 1948), the Fourth Circuit remarked

on the havoc that would be wrought with the LMRA if the Act were deemed to have the "effect of clothing each of the more than two hundred district judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board. ... ." This Court has many times sounded the same warning. In *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.*, 346 U. S. 485 (1953) it observed that (at pp. 490-91):

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

The conflicts envisioned have already appeared in this case. The court of appeals in its opinion carefully refrained from deciding this case "on an all or nothing basis" (R. 69). It rejected as a fiction the notion that a foreign ship is a floating piece of the country whose flag it flies; and empha-

sized that in another case where the contacts of the vessel with the flag state were different, it might very well uphold Board jurisdiction (R. 69, 73, 82).

In *Sociedad Nacional De Marineros De Honduras* v. *McCulloch*, 201 F. Supp. 82 (D. C. 1962), Judge Holtzoff reached the "all or nothing" result with a sweeping decision that the Board did not have jurisdiction over foreign flag ships employing foreign seamen, and no qualifications were noted.

It may be argued that our contention that the district court lacked jurisdiction to entertain this suit is academic, since the companion suit by Sociedad in No. 107 raises the identical issue as to Board jurisdiction. And unlike Empresa, Sociedad is a labor union with no effective statutory method for seeking review. Our answer to this is that Sociedad by its conduct has waived any right to contest the Board's decision. Additionally, the initial action of the district court in accepting jurisdiction over Sociedad's suit could only have been based on the ground that overtones of foreign affairs were involved, and this, as we contend, is an insufficient basis for district court intervention in NLRB election cases.

Prior to rendering its decision in this case, the Board made a special separate request of Sociedad to intervene and state its position (R. 17). Sociedad ignored the Board, making no response at all to the request (R. 17). Then, displeased with the Board's eventual decision, on the very last day before commencement of the election, Sociedad appeared in the District Court for the District of Columbia seeking a stay of the entire proceedings.

A litigant that disdains to appear before an administrative agency and exhaust the administrative remedies available to it, should properly be held to waive whatever right it may have to make a collateral attack in the courts

on agency action. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). If Sociedad had been willing to participate in the election, as it had every opportunity to do, and was successful, this entire litigation would be moot. *United Brick & Clay Workers* v. *Junction City Clay Co.*, 158 F. 2d 552 (6th Cir. 1946); *Madden* v. *Brotherhood and Union of Transit Employees*, 147 F. 2d 439 (4th Cir. 1945). *Vapor Blast Manufacturing Company* v. *Madden*, 280 F. 2d 205 (7th Cir. 1960).

B. The court of appeals failed to accord to the Board's findings the weight and respect to which they are entitled.

Section 10(a) of the Act empowers the Board to prevent unfair labor practices "affecting commerce." Section 2(6) defines commerce as "trade, traffic, commerce, transportation or communication . . . between any foreign country and any State. . . ." Section 2(7) defines "affecting commerce" to mean "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute. . . ." There is no question, as the court below acknowledged, that the shipping activities involved readily come within the Act's jurisdictional definitions of "commerce" and "affecting commerce." The issue confronting the Board then, as it noted in *West India Fruit & SS. Co.*, 130 NLRB 343 (1961), was not whether there was any jurisdictional basis for applying the Act, but rather "whether certain attendant circumstances" should be held to limit or bar application.

Resolving this type of issue obviously demanded of the Board the exercise of its experienced judgment and informed discretion in the very specialized field of federal labor relations. Board decisions of this character have been held by this Court to be entitled to "great weight"

and respect from a reviewing court. *Medo Photo Supply Corp.* v. *NLRB*, 321 U. S. 678 (1944); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944); *Packard Motor Co.* v. *NLRB*, 330 U. S. 485 (1947); *NLRB* v. *E. C. Atkins & Co.*, 331 U. S. 398, 403-404, 414 (1947); *Universal Camera* v. *NLRB*, 340 U. S. 476, 488 (1951).

In *NLRB* v. *E. C. Atkins & Co., supra*, this Court noted that it was "elementary" that the Board had the duty in the first instance of determining who are employees and employers subject to the coverage of the Act. In making this determination, the Board "must bring to its task an appreciation of the economic realities, as well as a recognition of the aims which Congress sought to achieve by the statute. . . . It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board's familiarity with the problems and its experience in the administration of the Act."

This Court further stated in *E. C. Atkins & Co.* that the "responsibility" for representing the "public interest" lies primarily with the Board, and "in the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest."

In the field of foreign flag shipping the Board has measured up to its responsibility in the finest traditions of an independent administrative agency. Its acknowledged expertise and specialized experience have been brought to bear on the problem in thorough deliberations marked by scholarship and sensitivity to the issues. The opinion

in its leading case, *West India Fruit & S.S. Co.*, 130 NLRB 343 (1961), is one of its outstanding opinions and speaks for itself as to the quality of the vision with which the Board has fulfilled its statutory functions.

Faithfully following the guide lines set down by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), and reaffirmed in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the Board conceives of its task as " 'ascertaining and valuing points of contact between the transaction and the governments whose competing laws are involved' and by 'weighing . . . the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority' " (130 NLRB at 354). In *Lauritzen*, as the Board observed, this Court was concerned with application of the Jones Act (46 U. S. C. §688) involving claims for personal injury by seamen. The contacts enumerated there naturally reflect the problems arising under that statute. Other statutes require emphasis of other contacts. In *Romero* v. *International Terminal Operating Co.*, *supra*, this Court, while reaffirming the contacts criteria of *Lauritzen*, significantly admonished that "due regard must be had for the differing interest advanced by the varied aspects of maritime law . . ." (358 U. S. at 382).

We are dealing here with a labor statute primarily designed to protect the commerce of this nation, and which depends for its jurisdiction upon that commerce. "Where the Labor Act is involved," said the Board in *West India*, " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*" (130 NLRB at 354).

With this formulation of the problem, the Board, in determining whether a particular foreign flag ship is subject to the provisions of the Act, has naturally looked at tangible operational facts. What the vessel does, where it goes and for whom it operates have been matters of important concern to the Board. The nationality of the flag or the crewmembers, or the domicile of the corporation holding nominal title to the vessel, are factors which, while they have not beeen overlooked by the Board, have been assigned their proper weight in the general reckoning. As the Board stated in this case:

> "The problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States" (R. 11).

In *West India* the Board held that it had jurisdiction because the vessel engaged in substantial continuing American foreign commerce for an American employer. In this case, the Board, on the basis of the record compiled at the hearing, emphasized the functional facts of United Fruit's maritime operations in which Empresa was clearly revealed as a controlled instrumentality through which United Fruit met its requirements for waterborne transportation to American markets.

The court below, lacking the benefit of the record of the hearing, tended to brush aside United Fruit's predominant role and the fact that we are dealing here with a United States enterprise entrenched in the commerce of this nation. It stressed the Honduran contacts of the vessels, all of which are essentially formalistic or peripheral in character and reveal nothing concerning the real nature

of the business in which the vessels are engaged. Thus, the court pointed to the Honduran flag, the Honduran incorporation of Empresa, the Honduran citizenship of the crew and their employment in Honduras, the visits of the vessels to Honduran ports, and the past contractual relations between Empresa and Sociedad (R. 77). Beyond this, the factor which weighed heavily with the court was its apprehension that application of the Act to Empresa's vessels would have an extraterritorial effect that could involve conflicts with Honduran laws.

The remainder of this brief is devoted to a consideration of these and other objections to Board jurisdiction.

C. Board jurisdiction would not constitute an unwarranted extraterritorial application of the LMRA.

1. Empresa is an American operation.

Application of the LMRA to the Empresa vessels, operated as they are by an American company, in United States commerce, cannot realistically be viewed as an extraterritorial extension of the statute. The ancient conceptualism that a Honduran flag ship is a floating piece of Honduran territory was discarded long ago. *Cunard SS. Co.* v. *Mellon*, 262 U. S. 100, 123-124 (1923); *Scharrenberg* v. *Dollar SS. Co.*, 245 U. S. 122, 127 (1917); *Wildenhus' Case*, 120 U. S. 1 (1887).

That the vessels regularly depart the territorial waters of the United States and voyage in international waters or in the territorial waters of foreign countries, including Honduras, does not change the fact that they are still engaged in the foreign commerce of this country. They go to the same places, and they operate in the same service, under the same direction and control, as United Fruit's

American flag vessels, which are admittedly subject to the Act. There being no functional basis for disparate application of the Act, it cannot otherwise be justified unless the flag is said to make all the difference.

To exempt the Empresa vessels from obligations under the LMRA simply because they fly the Honduran flag is to do much more than accord traditional respect to the foreign flag of a friendly nation, it is rendering abject obeisance and servile homage to the myth of a foreign power within the boundaries of our own country.

The critical mistake of the court below was its rejection of the Board's key finding that the Empresa vessels operate as a phase of a United States enterprise. Having chosen to disregard this, the court at the outset of its discussion of the underlying jurisdictional issue, concluded that labor relations on the vessels were the "primary concern" of Honduras (R. 73). It repeated the conclusion later on in its opinion (R. 77). If one starts with the ultimate assumption that labor relations are the primary concern of Honduras, and couples this with a rejection of the finding that the vessels function as an integral part of a United States enterprise in which an American company is a co-employer (R. 62), then one naturally ends by holding the LMRA to be inapplicable. We believe that the record overwhelmingly supports the Board's findings as to the singleness of the United Fruit-Empresa undertaking, and the findings should not have been so lightly overlooked.

2. The jurisdictional reach of the LMRA which is determined by the "effects test" does not stop at the boundary lines of this nation.

Assuming that the Empresa vessels are extraterritorial entities of some sort, it still does not follow that they are immune from the LMRA. For there can be no question that in regulating commerce Congress can and has extended

the reach of our laws beyond the geographical boundaries of the nation.

Thus, in *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 287 (1952), which involved extraterritorial application of the Lanaham Trade Mark Act (15 U. S. C. §1051 *et seq.*), this Court stated that it did not matter that:

> "Petitioner affixed the mark 'Bulova' in Mexico City rather than here, or that his purchase of supplies in the United States to be used in his Mexico business when viewed in isolation do not violate any of our laws. They were essential steps in the course of business consummated abroad; acts in themselves legal lose that character when they become part of an unlawful scheme. 'In such a case it is not material that the source of the forbidden effects upon commerce arise in one phase or another of that program.' *Manderville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237. In sum we do not think that Petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders."

Perhaps the best known line of cases giving extraterritorial effect to United States laws are those involving the antitrust laws: *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927); *Thomsen* v. *Cayser*, 243 U. S. 66 (1917); *United States* v. *Aluminum Co.*, 148 F. 2d 416, 444 (2nd Cir. 1945); *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633 (2nd Cir. 1956); *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (E. D. Ohio 1949), aff'd with modifications not here relevant, 341 U. S. 593 (1951); *United States* v. *R. P. Oldham Co.*, 152 F. Supp. 818, 822 (N. D. Cal. 1957); *United States* v. *Imperial Chemical Indus., Ltd.*, 100 F. Supp. 504, 592 (S. D. N. Y. 1951); *United States* v. *R. P. Oldham Company*, 152 F. Supp. 818 (N. D. Cal. 1957).

In these cases, as in the *Steele* case, the application of our laws to conduct taking place in foreign territories is based on the prohibited *effects* of that conduct on the interstate and foreign commerce of this nation. In other words, when in regulatory legislation Congress establishes the "effects" upon United States commerce as the jurisdictional criterion, the courts do not hesitate to vindicate the Congressional purpose even where doing so may in a very limited and special sense require extraterritorial application of the statute.

In *Vanity Fair Mills, Inc.* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 641 (2nd Cir. 1956), the reach of the antitrust laws was delineated as follows:

> "While Congress has no power to regulate commerce in the Dominion of Canada, it does have power to regulate commerce 'with foreign nations or among the several states.' This power is now generally interpreted to extend to all commerce, even in intrastate and entirely foreign commerce, which has a substantial effect on commerce between the states or between the United States and foreign countries. . . ."

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 444 (2nd Cir. 1945), a contract made outside the United States by foreign parties and purporting to operate only outside the United States was condemned on the ground that it was intended to and did restrain the foreign trade of this country. The court stated:

> "Both agreements would clearly have been unlawful had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them."

There can be no question, as we have shown, that the fundamental objective of the Labor Act is to eliminate

practices which have the "effect of burdening or obstructing commerce," and "commerce" includes "trade . . . between any foreign country and any state. . . ." (29 U. S. C. 152(6)). Necessarily, therefore, Congress must have envisioned that regulation under the Act would include the foreign commerce of the United States and to that extent the Act would apply extraterritorially. Congress, as this Court has observed, undertook in the LMRA "to regulate all conduct having such consequences that constitutionally it can regulate." *Polish National Alliance* v. *NLRB*, 322 U. S. 643, 647 (1944); *NLRB* v. *Fainblatt*, 306 U. S. 601, 607 (1939). And ". . . it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion [for determining jurisdictional coverage of the Act]" *Edison Co.* v. *Labor Board*, 305 U. S. 197, 222 (1938).

For this reason, the canon of construction upon which the court below relied which favors interpretation of Congressional enactments to apply only within the territorial limits of the United States is inapplicable (*Foley Bros. Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949)). For as this Court stated in *Foley Bros.*, application of the canon is a "valid approach" in ascertaining "unexpressed" Congressional intent. But in the Labor Act, Congress has expressed its intent that the Act apply to both the domestic and foreign commerce of the nation to the end that certain deleterious effects on that commerce may be eliminated.

Comparison of the jurisdictional provisions of the Eight Hour Law, which was involved in *Foley Bros.*, with those of the Labor Act, highlight the reasons why the canon of construction was applicable there but not here. The Eight Hour Law (40 U. S. C. §325(a)) provides that the "wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract

[between the United States and private contractors] shall be computed on a basic day rate of eight hours. . . ." *Foley Bros.* held the law inapplicable to an American citizen working under such a contract in Iraq and Iran on the ground that it could not be presumed that the literally universal jurisdictional coverage extended the law's regulation to the working conditions of foreign nations.

In contrast to the literally universal coverage of the Eight Hour Law, the jurisdictional coverage of the LMRA is limited to the commerce defined. Moreover, under the Eight Hour Law coverage is determined by the status of the individual, i.e., employment by a contractor engaged in fulfilling a government contract. Under the LMRA, coverage turns on the *effects* on United States commerce. An employee could satisfy the literal jurisdictional requirements of the Eight Hour Law performing his entire service outside the territorial limits of this country, as was done in *Foley Bros.* For the Labor Act to be applicable, there must be trade between a foreign country and this country. Empresa's vessels regularly call at United States ports.

If the purpose of the LMRA to eliminate harmful effects on United States commerce is to be realized, the Act must in the metaphorical sense be applied extraterritorially in instances such as shipping, where the very business involved is a moving instrumentality of foreign commerce. The test for such application ought not to be the specious one of the ship-territory, but whether the contacts of a vessel with United States commerce are so substantial in comparison with its competing contacts with other nations as to justify the Board in asserting jurisdiction. This is precisely the view taken of the problem by the Board in *West India* (*supra*).

3. The possibility that application of the LMRA to Empresa vessels may conflict with Honduran laws is irrelevant, and the conflicts pointed to are inconsequential.

In view of the Congressional purpose to minimize obstructions on the flow of the foreign commerce of the United States, the possibility that application of the LMRA may have extraterritorial effects is irrelevant, and certainly does not justify the judicial rule that foreign flag shipping is totally exempt from coverage of the Act. As this Court stated in *Lauritzen* v. *Larsen*, 345 U. S. 571, 582-3 (1953):

> "We do not question the power of Congress to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact."

Similarly in *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 372 (1960), this Court in upholding application of the Norris-LaGuardia Act to picketing by an American maritime union against a foreign flag ship, stated:

> ". . . a ship that voluntarily enters the territorial limits of this country subjects itself to our laws and jurisdiction as they exist."

While much emphasis has been placed on the potentiality of conflict between our laws and the laws of Honduras, if the Act is held applicable to Honduran flag ships, an examination of the complaint shows that the actual points of clash alluded to are of a vague and curious character, and whatever substance there is to them is left to surmise.

To begin with, paragraph "9" of the complaint (R. 3-4) summarizes several provisions of the Honduran merchant shipping law governing such items as the licensing of officers, and documents required to be carried by Honduran flag vessels. Clearly, application of the LMRA would in no

way interfere with Empresa's ability to comply with these and similar requirements of Honduran law. In *West India* (at 130 NLRB 357), the Board noted that "the courts have flatly told the Board that the rights guaranteed by the Act cannot be applied in such a fashion as to curtail the traditional authority which of necessity a master must exercise over his crew, or to relieve the crew individually or collectively of its traditional obligations and responsibilities to the ship, its officers and owners, including their obligation to respect such terms and conditions of employment as are specified in their existing shipping articles" (citing *Southern S. S. Co.* v. *NLRB*, 316 U. S. 31 (1949); *Texas Co.* v. *NLRB*, 120 F. 2d 186 (9th Cir. 1941); *Peninsular & Occidental S. S. Co.* v. *NLRB*, 98 F. 2d 411 (5th Cir. 1938); also *Rees et al.* v. *United States*, 95 F. 2d 784 (4th Cir. 1938).

Paragraphs "13," "14" and "15" of the complaint (R. 5) allege that the Ministry of Labor of Honduras has issued a ruling that the Board has violated the sovereignty of the Republic of Honduras; that under Honduran law Empresa is required to recognize Sociedad exclusively as bargaining agent for its seamen; and that NMU is forbidden to act as a union (presumably in Honduras only) because its juridic personality has not and cannot be recognized, since 90% of its members are not Honduran citizens.

The general conclusion of the Ministry of Labor that Honduras sovereignty has been violated is based mainly on the thoroughly discredited ship-territory dogma (R. 36-42). If this outworn cliché is deemed to defeat application of the Act to Honduran flag ships, it would of course have to be applied to the flags of all other foreign nations as well, and in one stroke would result in total renunciation by the Board of jurisdiction over every foreign-flag ship regardless of the relationship to the commerce of this nation.

United States shipping laws certainly regulate the employment relationship of American seamen on American flag ships equally as intensively as Honduran laws for Honduran flag ships (see, *e.g.*, 46 U. S. C. §§541-713). No difficulty has ever been experienced accommodating our shipping laws to the LMRA, and the result will be the same for Honduran laws, barring deliberate efforts by the government of Honduras to manufacture conflicts.

The allegation that under Honduran law Empresa is required to recognize Sociedad exclusively is a curious bit. Does this requirement hold for all times? If, in a secret ballot election, Empresa's seamen indicated a different preference—either NMU, Sindimar or "no union"—would Honduran law still require Empresa to recognize Sociedad to the exclusion of all other alternatives?

Finally, the insular and inhospitable 90% membership provision of Honduran law which would prevent NMU and every other non-Honduran union in the world from functioning in Honduras, is patently molded to immunize Panlibhon ship operators from the organizational activities of legitimate maritime unions. If the Board or the courts were to allow fear of encounter with this type of hostile legislation to preclude Board jurisdiction, then the hope of improving the working standards of Panlibhon seamen is indeed dim. In any event, the nature of the Empresa-United Fruit maritime operations, with vessels regularly calling at United States ports, renders it an easy matter for NMU to represent the seamen on the Honduran flag ships without ever setting foot in Honduras, precisely as NMU represents the seamen on United Fruit's American flag vessels. And if the affected seamen ever become dissatisfied with NMU's representation, they can always petition the Board for decertification, since under the LMRA no union can self-impose its domination for an indefinite period on unwilling employees.

Honduras cannot be prevented from enacting any type of repressive or discriminatory labor legislation it chooses. It may even frame laws deliberately aimed at creating conflicts with the LMRA, as it appears already to have done. The courts of our country should not be intimidated by this sort of international maritime politics.

We have nothing to be diffident about in extending the rights and protections of the LMRA to underpaid seamen employed in the commerce of this nation by an American company. Now they may designate a union of their own choice without fear of reprisal. The courts of this country would be yielding to shamefully aggressive and repugnant behavior if they permitted the rumblings of displeasure which have so far been heard from Panlibhon sources to pressure them into denying needy seamen the benefits of the LMRA.

Honduras might well profit from the example of equal and gracious treatment accorded a foreign labor union by the NLRB in *Hamilton Bros., Inc.*, 133 NLRB No. 85 (1961). There Sindimar petitioned the Board for an election on foreign flag ships operated by an American company which imported tropical produce. A total of eight ships were involved—six Honduran flag, one Nicaraguan and one American. The Board processed the petition and directed an election upon a showing by Sindimar of the required interest. We know of no complaint by the Republic of Honduras in that case that assertion of Board jurisdiction conflicted with Honduran laws.

In any event, in determining the jurisdictional reach of the LMRA, as the statute was enacted by Congress, the favor or disfavor of a foreign nation is hardly pertinent. If Congress were motivated by vague anxieties of retaliation, it would have long ago eschewed enactment of immigration, custom, health and safety laws.

Over the years, a constant stream of protest has been issuing forth from foreign maritime nations critical of the various forms of regulation and control exercised by United States agencies over foreign flag shipping in our national interest. This protest has not deterred the enforcement of federal statutes, nor has it resulted in retaliation against United States flag shipping.

Examples chosen at random from the maritime pages of recent issues of the New York Times disclose such items as vigorous protest by Mexico against refusal of U. S. Coast Guard to permit a Mexican cruise ship to sail from New York harbor for safety reasons;[4] "concerted drive" by foreign nations against implementation of the Bonner Act by the Federal Maritime Commission, which is accused of seeking to regulate rate making and other practices of foreign flag shipowners in Europe as well as the United States;[5] announcement of Prime Minister Macmillan that he will use "any means, official or unofficial," to thwart efforts of the Federal Maritime Commission to regulate the affairs of foreign shipping conferences;[6] refusal of eight British shipping lines to produce documents subpoenaed by the Federal Maritime Commission;[7] charge by a Danish shipping concern that the United States' cargo preference laws are "balkanizing" the high seas.[8]

D. The LMRA, as recently amended, requires the Board to take jurisdiction over foreign flag ships.

In late 1959 Congress added section 14(c)1 (29 U. S. C. §164(c)1) to the LMRA, thereby requiring the Board

[4] New York Times, December 23, 1961, p. 1; January 7, 1962, p. 87.

[5] *Ibid.*, May 18, 1962, p. 62.

[6] *Ibid.*, May 9, 1962, p. 86.

[7] *Ibid.*, May 20, 1962, p. 73.

[8] *Ibid.*, July 7, 1962, p. 52.

to assert jurisdiction over foreign flag vessels whose substantial contacts with American commerce outweigh their contacts with the flag nation or any other nation. Section 14(c)1 reads as follows:

> ". . . the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

On May 23, 1958, the Board had asserted jurisdiction over two Liberian flag ships which sailed between the United States and Cuba. *Peninsular & Occidental SS Co.*, 120 NLRB 1097 (1958). On December 11, 1958, the Board issued a decision that it would assert jurisdiction over all "freight transportation enterprises engaged in the furnishing of interstate transportation services . . . which derive at least $50,000 gross revenues per annum from such operations . . ." *HPO Service, Inc.*, 122 NLRB 394, 395 (1958). Congress presumably had knowledge of these cases when it enacted section 14(c)1.

Moreover, Congress was well aware of the rapid growth of flag of convenience fleets. *Hearings On Vessel Transfer, Trade-In, And Reserve Fleet Policies Before Committee On Merchant Marine, and Fisheries*, 85th Cong., H. R., 1st Sess. (1957). Indeed, almost contemporaneously with debate on the Landrum-Griffin amendments, the House Sub-Committee on Merchant Marine was holding hearings on foreign flag affiliations of subsidized American shipowners. *Hearing Before The Committee On Merchant Marine*, 86th Cong., H. R., 1st Sess. (1959).

While it is true that section 14(c)(1) was directed primarily at filling the no-man's land created by *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1 (1957), it is equally true that section 14(c)(1) involved perhaps the most

thorough and sweeping review of NLRB jurisdiction since the Board was created by the Wagner Act. It is a fair inference that in considering passage of this section Congress had before it the limits to which, up until that time, the Board had asserted its jurisdiction. We submit, accordingly, the Congressional failure to exclude from coverage of section 14(c)(1) flag of convenience ships represents recognition of the appropriateness of the assertion of jurisdiction in *Peninsular & Occidental, supra,* and is therefore authority for the assertion of jurisdiction in this case.

E. The Honduran flag is no bar to Board jurisdiction.

There is no question, as the Board observed in *West India,* that: "The United States with other maritime nations of the world, has as a principle of comity accepted the general maritime law, including the flag law doctrine . . ." (130 NLRB at 353). Under this doctrine, nationality of a ship is evidenced by its papers and flag, the registering country determines for itself the "conditions on which it will grant nationality to a merchant ship," and only the registering country can question the validity of a registration. There is no doubt also that the registering country acquires various aspects of authority over the vessel. *Lauritzen* v. *Larsen,* 345 U. S. 571, 584 (1953).

But all this has never been deemed to impose any limitation on the sovereign powers of Congress to legislate with respect to foreign flag vessels engaged in the commerce of this nation. As a matter of comity, the reach of our laws has at times been restricted to American flag vessels. But this is only a matter of comity and implies no inherent limitations on Congressional authority. *Lauritzen* v. *Larsen, supra; Wildenhus' Case,* 120 U. S. 1 (1887). . .

As earlier noted, in *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U. S. 365 (1960), this Court applied the Norris-LaGuardia Act to picketing of a foreign flag ship by an American maritime union. Recently, in *Bowater Steamship Co.* v. *Patterson*, 303 F. 2d 369 (2d Cir. 1962), the Second Circuit applied the Norris-LaGuardia Act to picketing in Buffalo, New York of a British flag vessel by a Newfoundland union over a labor dispute which had arisen in Newfoundland.

The Jones Act has in a number of cases been applied to accidents occurring in international waters on foreign flag ships including two belonging to United Fruit, *i.e.*: *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2d Cir. 1932), *cert. den.*, 287 U. S. 642 (1932); *Zielinski* v. *Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S. D. N. Y. 1952)—this despite the fact that in *Zielinski*, as here, Article 10 of the ship's articles expressly provided that a claim for personal injuries "shall be governed and determined exclusively by the laws of the Republic of Honduras . . ." (Empresa Ex. 24, S. M. 580).

Other cases holding the Jones Act applicable to foreign flag ships are: *Gambera* v. *Bergoty*, 132 F. 2d 414 (2d Cir. 1942), *cert. den.*, 319 U. S. 742 (1943); *Rodriguez* v. *Solar Shipping, Ltd.*, 169 F. Supp. 79 (S. D. N. Y. 1958); *Carroll* v. *United States*, 133 F. 2d 690 (2d Cir. 1943); *Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2d Cir. 1959); *Babolakis* v. *Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 238 (S. D. N. Y. 1958).

In *Gerradin* v. *United Fruit Co.*, *supra*, the Second Circuit in holding the Jones Act inapplicable to an American owned foreign flag vessel refused to be stymied by the "illusionary shield" of foreign registry:

> "If defendants' contention be sound, American owners and chartered owners of vessels can escape liability to American seamen employed on their ships by procuring registry under a foreign flag. We feel

> little doubt that the broad contention of the defendant that vessels of the American merchant marine are limited to those documented under the laws of the United States is not well founded" (at p. 927).
>
> . . . . .
>
> "(I)t seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a ship owner who bears such an illusionary shield (at p. 929).

In *Bobolakis* v. *Compania Panamena Maritima San Gerassimo, S. A., supra*, Judge Irving Kaufman warned that the courts will not be "baffled" by the paper corporate manipulations of Panlibhon ship operators.

> "... under the view pressed by Compania, an American owner might escape his statutory liability merely by interposing a foreign corporation between himself and the vessel, both of which, for all practical purposes, he owns. I do not believe that the law can be so easily baffled."

In *Navios Corp.* v. *National Maritime Union of America*, 402 Pa. 325, 338-339 (1960), *cert. den.*, 366 U. S. 905 (1961), the Pennsylvania Supreme Court, in holding that the question of the LMRA's coverage of foreign flag shipping was arguable and therefore within the exclusive competence of the NLRB, underscored the relevancy of Jones Act cases to the problem:

> "The appellants point out that it is the policy of the United States government to recognize 'a vessel's foreign 'flag of convenience.' Since, however, this policy does not deter the federal courts from looking behind such flags in cases involving federal regulatory statutes like the Jones Act, for instance, it may reasonably be inferred that neither should it

deter the NLRB from looking behind such flags in cases involving the LMRA."

In addition to the Jones Act, the following wage provisions of the Merchant Seamen's Act have also been held applicable to foreign flag ships despite the absence in the statutory language of any clear expression of Congressional intent that this be done:

> 46 U. S. C. §593: Dealing with payment of seamen's wages upon loss or wreck of a vessel. *Avgoustis* v. *Erini Shipping Co.*, 177 F. 2d 461 (2d Cir. 1949);
>
> 46 U. S. C. §594: Providing for payment of seamen's wages in case of improper discharge. *Avgoustis* v. *Erini Shipping Co., supra;*
>
> 46 U. S. C. §596: Fixing the time for payment of seamen's wages upon termination of employment. *The Flatero* v. *Arias,* 206 F. 2d 267, 274 (4th Cir. 1953); *The Sonderborg,* 47 F. 2d 723 (4th Cir. 1931).

Similarly, the section in the federal shipping code providing for limitation of an owner's liability in the event of loss or damage to a vessel, as originally enacted (9 Stat. 635 (1851)), did not contain any express reference to foreign flag vessels but was nevertheless held applicable to them. *The Scotland,* 105 U. S. 24 (1882). Subsequently this section was amended to refer to foreign flag vessels expressly, but this in no way reflected on decisions prior to the amendment (49 Stat. 960, 46 U. S. C. §183 (1935)).

Earlier we pointed out that as required by the Shipping Act (*supra* p. 11) United Fruit files annual reports with the United States Maritime Commission which include details on its foreign flag vessels. The Merchant Marine Act of 1936, 64 Stat. 773 (1950), 46 U. S. C. 1283 contains a provision dealing with war risk insurance which provides (46 U. S. C. §1283):

"The Secretary may provide the insurance and reinsurance authorized by Sec. 1282 of this Title with respect to the following persons, party or interest:

"(a) American vessels, including vessels under construction, foreign flag vessels owned by citizens of the United States or engaged in transportation in the waterborne commerce of the United States or in such other transportation by water or such other services as may be deemed by the Secretary to be in the interest of the national defense or national economy of the United States when so engaged."

Significantly, the collective bargaining agreement between Empresa and Sociedad calls for war risk insurance as contemplated in the Merchant Marine Act of 1936 (R. 33-34).

In short, when foreign flag vessels operate in the commerce of this country, this country shares authority over such vessels with the flag state. The extent to which this country will assert such authority depends on a number of factors including the circumstances of the vessels' operations, the matter to be regulated, and the applicable statute. If the flag alone were the governing consideration, there would have been no need for this Court in *Lauritzen* to have enumerated contact points and connecting factors other than the flag.

In 1960, the then Attorney General rejected the flag-law-governs-all argument, although opposing Board jurisdiction in *West India*, this case, *Peninsula & Occidental Steamship Co*, 132 NLRB 10 (1961); and *Eastern Shipping Corp.*, 132 NLRB 930 (1961). As intervenor on behalf of the Departments of Defense and State in the consolidated hearing convened by the Board in those cases (R. 9), the Attorney General enumerated certain principles

which he urged the Board to apply in determining whether a particular vessel and its crew were subject to the Act. One of these principles would require jurisdiction to be upheld, regardless of the flag of a vessel, wherever an American owner sought to evade his contractual obligations to an American union by foreign registry. This principle presupposes Board jurisdiction over at least some foreign flag vessels.

While *Lauritzen* nominally attached "cardinal importance to the law of the flag," it nevertheless recognized that other contact points could outweigh the flag and expressly approved earlier Jones Act cases where the courts "pressed beyond the formalities of more or less nominal foreign registration" to enforce the obligations of "our law" (345 U. S. at 587).

Additionally, as the Board emphasized in *West India*, *Lauritzen* dealt with the Jones Act, and the contacts enumerated there reflect the problems arising under that statute. Other laws require emphasis of other contacts. "Where the Labor Act is involved," said the Board, " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen*" (130 NLRB at 354).

Clearly, therefore, the naked fact that Empresa's vessels fly the Honduran flag is no bar to Board jurisdiction.

F. Application of the Labor Act to Empresa's vessels will not detract from their Honduran nationality.

Related to the claim of absolute flag supremacy is Empresa's further contention that assertion of Board jurisdiction will somehow impugn the Honduran nationality of its vessels and thereby infringe the sovereignty of Honduras. The Board in *West India* expressly disavowed

any such intention, stating that it accepted "without question" the Liberian nationality of the vessel involved in that case and the paramount authority of Liberia over it (130 NLRB at 359):

> "The issue is whether the Liberian nationality of the vessel, *which we accept without question*, divests the Board of that jurisdiction it would have but for that foreign nationality. In finding that it does not, *we are not divesting or attempting to divest Liberia as the flag state of its paramount rights, for example, to control the movement of, to requisition, or to tax the vessel.* But there is nothing inconsistent between our recognizing the foreign nationality of a foreign flag vessel, and the application of the Act in those situations where the foreign state in effect permits its vessel to be operated as an integral part of an essentially domestic enterprise engaged in a continuing and immediate manner in both the foreign and domestic commerce of this nation" (italics added).

Thus, while the vessels involved in this proceeding are at sea, Honduran law would determine the citizenship of a newborn child, or the legality of a will, or business contract. Honduras would similarly retain its authority to deal with crimes or disciplinary problems aboard the vessels. More important, Honduras' authority to tax the vessels, requisition them, control their registration, fix standards of competence for unlicensed seamen and officers would all remain unaffected.

The nationality of a vessel is certainly no more sacred than the nationality of an individual. An alien visiting or doing business in this country is subject to our laws without his nationality being called into question. The same principle applies to foreign flag vessels which engage extensively, if not exclusively, in the commerce of this country.

As has been authoritatively recognized, while a vessel's nationality may be "conclusively" determined by its flag, this does not prevent another nation from exercising authority or "shared competence" over it, where its operations have substantial effects on the welfare of the other nation, even though these effects do not occur or are not felt "entirely within" the boundaries of the other nation. A nation may "quite lawfully apply its authority to ships to which other states have attributed national character, just as it may to individuals and corporations bearing the nationality of other states." McDougal, Burke and Vlasic, "The Maintenance of Public Order at Sea and the Nationality of Ships," 54 *Am. J. of Int'l Law* 25, 54-55 (1960).

This is of particular importance for Panlibhon shipping, where the interests of the United States may be far superior to that of any other country. Most Panlibhon vessels involve the interests of at least two nations. Empresa's fleet is a perfect illustration of this. For here we have Honduran flag ships ultimately owned by an American company and operated as a part of its United States business.

The Board pointed out in *West India* that Panama, Liberia and Honduras have acquiesced in an arrangement whereby the United States has secured pledges from American owners of Panlibhon ships to make them available for requisition by this country in time of national emergency (130 NLRB at 364-5). This alleged "effective control" by the United States applies even to Panlibhon ships built in recent years that have never sailed under United States flag. If this country can reserve to itself the paramount right of requisition over much of Panlibhon shipping, there

obviously is nothing left to the claim of exclusive authority for the flag nation.

A timely example of the point made here is found in a front page news story in The New York Times of October 4, 1962. The United States is reported to have "decided on drastic unilateral steps to try to prevent American, allied and neutral shipping from carrying Soviet-bloc supplies to Cuba." Among other things, President Kennedy will announce orders prohibiting "United States-owned ships sailing under foreign registry from participating in the Cuban trade." Any other foreign flag ships carrying munitions to Cuba will be "barred indefinitely from United States ports."

G. The internal order rule does not bar assertion of Board jurisdiction.

Empresa may argue that application of the Labor Act to its vessels would affect their internal order which is subject to exclusive regulation by the flag state. In *West India* the Board concluded, and we agree, that the internal order rule "is but a part of the broader flag law doctrine. . . ." If flag law does not foreclose Board jurisdiction, then the internal order rule which is but a segment of flag law, could not have that effect. This finds support in *Lauritzen* where internal order was included in the discussion of flag law generally.

But even if internal order is considered apart from overall flag law no different result is reached. The classic formulation of the internal order rule is found in *Wildenhus's Case*, 120 U. S. 1, 12 (1887), where it was described as reaching "all matters of discipline and all things done on board which affected *only* the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port. . . ." (italics added). In

Urivac v. *Jarka Co.*, 282 U. S. 234, 240 (1934), it was indicated that internal order embraces "discipline and private matters that do not interest the territorial power."

From this we see, as the Board pointed out in *West India*, that the internal order doctrine is limited to those events which affect only the internal affairs of a vessel. This plainly renders the doctrine inapplicable to this case. Here we are dealing with a fleet of vessels which have a substantial and continuing connection with the commerce of this nation.

Apart from these considerations, the Board correctly held in *West India* that application of the Act to sea borne commerce does not involve any interference with the internal order of a vessel. To begin with, the internal order doctrine was "developed and acquired its meaning more than a hundred years ago—that is, at a time when the rights and obligations created by the Act were unknown at law" (130 NLRB at 357).

Moreover, as the Board has observed, assertion of jurisdiction will not in actual effect interfere in any way with the internal order and discipline aboard the vessels. Empresa would, of course, be obligated to bargain with NMU under the Labor Act. But the Act does not require the inclusion of any specific terms in an agreement or the reaching of any specific agreement at all so long as there is bargaining in good faith. As this Court pointed out in *NLRB* v. *Insurance Agents International Union*, 361 U. S. 477, 488 (1960):

> "Congress [in enacting the Labor Act] intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."

The Act, in other words, encourages private collective bargaining and any agreement reached is the private agree-

ment of the parties, and the internal order doctrine has no application to private action. The crewmembers of Empresa vessels presently work under the terms of a private collective bargaining agreement with Sociedad. Certainly a private collective bargaining agreement with NMU would not constitute interference with the internal order of the vessels—or at least not the type which the doctrine was classically or practically designed to prevent.

H. The Honduran incorporation of Empresa and the non-resident alien status of the crew are no bar to Board jurisdiction.

Neither the Board nor the courts in applying the Labor Act have ever discriminated between foreign or domestic corporations, or between alien or American workers so long as the activities of the foreign corporations and the alien workers are in the commerce of this nation. *Logan and Paxton*, 55 NLRB 310, 315, n. 12 (1944); *Italia Societa per Azioni di Navigazione*, 118 NLRB 1113 (1957); *Brown-Company*, 109 NLRB 173 (1954).

Further, the fact that the crewmembers are nonresidents is of no consequence. Empresa's vessels regularly visit this country. During such visits the crewmembers are working in this country to the same extent as the many nonresident aliens transiently employed here over which the Board has consistently and customarily asserted jurisdiction. *Italia Societa per Azioni di Navigazione, supra; Brown Company, supra.*

These crewmembers, as the Board noted in *West India*, are "at all times . . . working within the foreign commerce of this nation. . . . [I]t would be anomalous at best to base jurisdiction upon the citizenship and residence of the parties involved, rather than upon their relationship to the

protected commerce of this nation. Surely, a labor dispute involving the *Sea Level* would affect American commerce neither more nor less because the crew is foreign rather than American" (130 NLRB at 360-361).

Nor does the fact that a majority of the crewmembers were hired in Honduras make any difference. Wherever hired, they work in the commerce of this country for an American company. This company cannot escape obligations to its employees under the LMRA by hiring them abroad. As this Court stated in *Cunard SS. Co.* v. *Mellon*, 262 U. S. 100, 125 (1925), quoting the words of Chief Justice Marshall in *The Exchange*, 7 Cranch. 116, 144:

> "'When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country.'"

I. The assertion of jurisdiction by the Board will not infringe treaty obligations of the United States with Honduras.

Empresa, careful to cite only a single paragraph of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras, 45 Stat. 2618 (1927), i.e., Article 10, would have the Court read the Treaty as embodying a form of "yellow dog" compact immunizing Honduran flag shipping from

the jurisdiction of the Board and the organizational activities of American maritime unions generally. However, the treaty, far from presenting obstacles to Board jurisdiction, actually authorizes it. Article 10 sets forth the unchallenged truism that a vessel's flag determines its nationality. However, as we have shown (*supra*, p. 47), and the Board held in *West India*, alien status is no obstacle to application of the Act.

The court below also referred to Article 22 of the treaty without drawing any conclusions as to its significance (R. 63, 80). We read Article 22 to support Board jurisdiction. It provides:

> "A consular officer shall have exclusive jurisdiction over the controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases wherever arising between officers and crews pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over the issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

As can be seen, the first sentence of Article 22 grants to a consular officer exclusive jurisdiction over controversies arising out of the "internal order" of vessels and "pertaining to the enforcement of discipline on board." This supports our prior contention that "internal order" is limited to minor shipboard incidents including discipline and related matters. The reasons we discussed against acceptance generally of the internal order doctrine as precluding Board jurisdiction (*supra*, pp. 45-47), apply with

equal force against acceptance of the doctrine through the medium of the treaty.

The second sentence of Article 22 dealing with "wages and the execution of contracts relating thereto," eliminates the consular officer's exclusive jurisdiction and provides in effect that he shall have concurrent jurisdiction with United States authorities and then only to the extent permitted by "local laws." If a vessel's internal order does not encompass jurisdiction over wages and contracts relating thereto, and local laws are applicable, then plainly the LMRA is one such local law and the jurisdiction of the NLRB is confirmed.

The remainder of the treaty codifies a civilized program for co-existence of friendly nations "responsive to the spiritual, cultural, economic and commercial aspirations" of the nationals of each state (45 Stat. at 2618). To this end, the treaty provides that the nationals of one of the "contracting" countries when in the territorial jurisdiction of the other shall enjoy specified rights and privileges. At best these rights and privileges are equal to those enjoyed by resident nationals. At least they are equal to those enjoyed by the nationals of the most favored nation.

This means that Empresa, granting it to be a full-fledged Honduran national, when engaged in the commerce of this nation, enjoys no higher prerogatives, no more exalted status than American ship operators. Empresa is subject to the same obligations under the LMRA and the same free play of private economic forces in the American economy—including the organizing activities of American maritime unions. Federal District Judge Frederick van Pelt Bryan, in *Afran Transport Company* v. *National Maritime Union*, 169 F. Supp. 416, 422, n. 1 (S. D. N. Y. 1959), cited with approval by this Court in *Marine Cooks &*

Stewards (362 U. S. at 365), recognized the inapplicability of the Treaty of Friendship with Liberia, which is almost identical to the treaty with Honduras, with respect to the organizing rights of American maritime unions:

> "At the outset it should be noted that the Treaty between the United States and the Republic of Liberia which is relied on by the Liberian plaintiffs does not confer upon them or upon their vessels any greater rights than those of American corporations or vessels. It goes no further than to place them on a parity with American corporations and vessels in the respects enumerated by the treaty."

J. The *Benz* case does not bar assertion of Board jurisdiction.

We have no quarrel with this Court's holding in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U. S. 138 (1958). We urge however that *Benz* does not rule out application of the Labor Act to all foreign flag ships regardless of the circumstances of their operations. *Benz* was rejected as a conclusive bar to Board jurisdiction by the New York Court of Appeals in *Incres Steamship Co., Ltd. v. International Maritime Workers Union*, 10 N. Y. 2d 218 (1961); the Pennsylvania Supreme Court in *Navios Corp. v. National Maritime Union*, 402 Pa. 325, 332 (1960); the Federal District Court in *Afran Transport Co. v. National Maritime Union*, 169 F. Supp. 416, 424-5 (S. D. N. Y. 1958); the NLRB in *West India Fruit & SS. Co.*, 130 NLRB 343, 361-364 (1960) and subsequent foreign flag cases; and even by the court below which held that the issue of LMRA coverage for foreign flag ships could not be decided on an all or nothing basis.

We disagree with the court below that *Benz* weighs against application of the Act in this case. To be sure,

Benz did hold the Act inapplicable to a dispute arising on a foreign flag ship operated by a foreign crew under foreign articles which "erupted" while the vessel happened "temporarily" to be in an American port. *Benz* involved a foreign tramp steamer, which, after one or two fleeting and haphazard contacts with an American port, became embroiled in a labor dispute between the master and crew in which American labor unions thereafter joined as partisans of the crew. After picketing was enjoined, the vessel sailed away and two years later had not touched an American port again. This Court stressed in its opinion the happenstance and fortuitous quality of the vessel's American contacts stating (353 U. S. at 142):

> "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing."

The distinctive feature of *Benz* that the vessel there had only a "temporary" or "transient" connection with an American port has been repeatedly recognized (*Incres SS. Co., supra; Afran Transport Co., supra; Navios Corp., supra).*

In *Marine Cooks & Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 369 (1960), this Court underscored this limitation of the *Benz* holding:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happended temporarily to be in American waters."

Benz hardly warrants the conclusion that coverage of the Act is barred where, as here, Empresa's vessels operate

extensively, if not exclusively, in United States commerce as an integral part of an American business. As this Court has admonished, "words of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co.* v. *Wantock*, 323 U. S. 126, 133 (1944).

Moreover, we do not read the generic reference in *Benz* to "American employers and employees" to mean that the Act is never applicable to foreign employers or employees who carry on their business in this country. When alien workers are employed by employers engaged in business in the United States, the aliens are, for the purposes of the Act, American workers, and they enjoy the same protection under the Act as citizen workers. By the same token, when an alien employer volitionally engages in the commerce of this nation, he should be bound by the same labor laws that apply to his American competitors. Congress could not have intended otherwise. Thus, the Act applies where an Italian ship operator employing alien workers engages in business in this country. *Italia Societa per Azioni di Navigazione*, 118 NLRB 1113 (1957).

We disagree completely with the court below that in one respect this is a weaker case than *Benz* for applying the Labor Act because in *Benz* the only issue was whether Section 303 of the Act was applicable, while here the whole panoply of labor regulation under sections 7, 8, 9 and 10 of the Act is in issue. In *Benz* the petitioners argued that the district court lacked jurisdiction of the controversy because the subject matter had been preempted by the LMRA. In holding that there was no preemption, the majority opinion obviously considered the Act in its entirety, and the rejection of the defense of preemption was not based on a single provision of the Act.

We are mindful that in *Benz* this Court stated that in its study of the Act it could find nothing either in the Act itself or in legislative history to indicate that Congress intended to cover foreign flag ships with foreign crews.

However, since the *Benz* case was decided, as we have already noted, Congress in a thorough and sweeping review of the scope of LMRA coverage added section 14(c)(1) and did not exclude foreign flag ships, although between the decision in the *Benz* case and the passage of section 14(c)(1) the Board had asserted jurisdiction over such vessels.

Moreover, it would have been unusual, to say the least, if the Act did contain an express inclusion for foreign flag ships. For the Act contains no express inclusions for any category of employer. The jurisdictional coverage of the Act, as we have shown, is based on the "effects test." The Act is a statute of general inclusion and only specific exclusion.

The fact that legislative history is vague and inconclusive hardly justifies the absolute judicial rule that the Act can never be applicable to any foreign flag ship with an alien crew. This is particularly so in view of the many strange and varied forms that flag of convenience shipping can take, and its devastating economic impact on American merchant seamen.

Moreover, such absolute rule would create the anomalous situation of this Court saying in *Marine Cooks* that American unions may picket on the waterfront to protest loss of jobs to Panlibhon shipping, but the facilities of the Board are not available to them to resolve the disputes peacefully.

The *Benz* case was decided before the Board had handed down any of its decisions in the foreign flag field, and this Court did not have the benefit of the Board's experience

and deliberations on the problem. The Board has recently decided six foreign flag shipping cases, *i.e.*: *West India Fruit and SS. Co.*, 130 NLRB 343, (1961); *Peninsular & Occidental Steamship Co.*, 132 NLRB 10 (1961); *Eastern Shipping Corp.*, 132 NLRB 930 (1961); *United Fruit Co.*, 134 NLRB No. 25 (1961); *Hamilton Bros.*, 133 NLRB No. 85 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 32 (1962); *Dalzell Towing Company, Inc.*, 137 NLRB No. 48 (1962).

Each of these cases required of the Board what this Court described in *San Diego Building Trades* v. *Garmon*, 359 U. S. 236 (1959), as "*ad hoc* inquiry into the special problems of labor management relations involved in a particular set of occurrences" to determine the impact "on the entire scheme of federal labor policy and administration" (359 U. S. at 242). No uniform fact situation is discernible to which a generalized formula applies.

Foreign flag ships may be owned and controlled outright by American corporations (*West India, Hamilton Bros., and Owens-Illinois*), or they may be owned and controlled by American interests operating through nominal foreign corporations (*Peninsular & Occidental, United Fruit,* and *Dalzell*); or they may be owned by foreign interests and operated jointly through a foreign corporation and a domestic agency corporation (*Incres, Eastern*). The services engaged in by the vessels in each case similarly vary. They may operate as car ferries shuttling back and forth on short voyages between a United States port and a nearby foreign port (*West India*); they may carry passengers in the Caribbean cruise trade (*Peninsular & Occidental, Incres* and *Eastern*); they may engage in the banana boat trade (*United Fruit Co.* and *Hamilton Bros.*); they may tow barges loaded with pulpwood (*Owens-Illinois*);

or they may be held available for charter by anyone in the worldwide tramp market (*Dalzell*). The proceeding may come before the Board on the petition or charge of a foreign union (*Hamilton Bros.*), or an American union (*West India, Peninsular & Occidental, Eastern, United Fruit, Owens-Illinois, Dalzell*).

In its most recent foreign flag decision, *Dalzell Towing Company, Inc.*, 137 NLRB No. 48 (1962), the Board declined to assert jurisdiction over a Panamanian flag vessel even though it concluded that the vessel was operated as "essentially a domestic U. S. enterprise." The decision was based on the fact that the character of the shipping involved was determined by the business of the charterers rather than the business of the owner-operator, and the charterers could be anyone in the world charter market. Because of this "fortuitous element underlying the physical contacts of the vessel with the United States," the Board chose to "defer to the law of the flag."

From the foregoing review of recent Board decisions, we see that in each case the Board was called upon to assemble and evaluate a unique array of facts and reach a determination as to whether it was dealing with an essentially domestic enterprise or something else—or whether the foreign aspects of a particular case militated against the assertion of jurisdiction. We do not believe that this Court in *Benz* intended to impose prior restrictions on Board inquiry, nor has Board action exceeded any of the jurisdictional limitations for which *Benz* stands. If anything, the Board in *Dalzell* appears to have defined Board jurisdiction in much narrower terms than would seem permissible by *Benz*. The Board has been careful to emphasize in this case (R. 11) and in *Dalzell* that the fact that a vessel regularly calls at United States ports is not alone sufficient for coverage under the Act.

POINT II.

Board jurisdiction will assure a uniform federal maritime labor policy for foreign flag shipping and other beneficial results.

Only through the processes of the Board can a uniform peaceful solution be achieved to the labor problems of flag of convenience shipping. To deprive the Board of its rightful role in resolving the many and difficult issues in this sensitive area, is to invite a checkerboard pattern of resolution with decisions varying from court to court and jurisdiction to jurisdiction. A premium will be placed on forum shopping; and the result is bound to be confusion and unrest on the waterfront culminating in paralyzing strikes. Inability to reach agreement on the organizing rights of the maritime unions with respect to foreign-flag ships was a key issue in the 1961 nationwide maritime strike—a matter alluded to in the Court of Appeals' opinion (R. 80-81).

The court below would take from the Board and vest in the federal district courts overriding authority to determine the scope of the LMRA in the field of foreign commerce, including foreign flag shipping. This makes peculiarly apt the warning of this Court, which we earlier noted (*supra*, p. 19), that substitution of a multiplicity of tribunals, including federal courts, for single centralized administration by the NLRB is bound to breed a spate of variegated, incompatible and conflicting adjudications in a field where uniformity is most to be desired. *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U. S. 485 (1953).

As an administrative agency with nationwide facilities, only the Board is in a position to undertake systematic development of a progam to deal with foreign flag shipping.

In its internal procedures, the Board can handle many cases on the same general subject at one time, and map out a broad and definitive program for dealing with the problems presented. With all cases being screened through agency processes, the Board can give precise shadings to its rulings to fit the particular situations at hand. It can avoid the "all or nothing" result which courts often find so attractive, and it has the tools and facilities to take account of relevant economic and social data in a manner which no court can duplicate.

The problem of diversity in the administration of the law, however, does not end with the federal courts. Panlibhon shipping interests are essentially contending that the LMRA is inapplicable to all foreign flag ships. Incres openly urges this in its brief to this Court. Empresa has said much the same thing, although not so openly. In *Fruit Dispatch Co.* v. *National Maritime Union* (La. Ct. of App., No. 193, March 12, 1962, not officially reported), 50 LRRM 2077, a United Fruit subsidiary, in obtaining an injunction against picketing of Empresa vessels by NMU, persuaded the Louisiana state courts that *Benz* stood for an absolute proscription against Board jurisdiction. The argument was adopted by Judge Holtzoff in *McCulloch* v. *Sociedad*, No. 107. The Second Circuit, expressly refraining in this case from the all or nothing result, has left the issue open, while narrowly circumscribing the scope of Board jurisdiction.

If access to the peaceful processes of the Board is denied the maritime unions, they will have no alternative but to resort to self help measures to alleviate the crippling competition of Panlibhon shipping. The operators of Panlibhon vessels will doubtless seek injunctions against such activities in the state courts. They will ignore the federal courts because they have been told in *Marine Cooks* and

Afran that the *Norris-LaGuardia Act* has taken the federal courts out of the injunction business.

If authority to adjudicate the growing economic conflict between the maritime unions and Panlibhon ship operators should devolve on the state courts, the danger of diverse and conflicting decisions will be compounded many times over. The state courts of every coastal state in the nation will become potential arbiters of the profound issues involved with local laws and attitudes decisive factors in each case. Lost will be not only uniformity in administration of federal labor law, but uniformity in federal maritime law as well, *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215-17 (1917); *Pope and Talbot* v. *Hawn*, 346 U. S. 406, 409 (1953).

In *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), this Court recently stated:

> "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the efforts of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy."

These words contain forceful implications for the issues here. For plainly, if there is to be an orderly and consistent development of a national labor policy to govern the organizing of foreign flag shipping, and the industrial peace envisioned by such policy, then the task of regulating and disciplining the organizational activities of maritime unions in the foreign flag field must be entrusted to the

Board. Only by unitary federal control will it be possible to avoid the contradictions and disparities inherent in local administration.

The claim that state courts or even federal district courts have jurisdiction of this controversy should be seen for what it is—an attempt to gain complete immunity for Panlibhon shipping from the organizing activities of American maritime unions. Panlibhon operators obviously hope for more sympathetic treatment from the courts than from the Board. They further hope that the courts will equate a finding of lack of Board jurisdiction with illegality of union conduct—otherwise court jurisdiction would not be so attractive to them.

The claim that these issues belong in the courts and not before the Board exposes a fatal inconsistency in the contentions of the Panlibhon ship owners. On the one hand they contend that the Board—a government agency—has no jurisdiction of the controversy. On the other hand, they contend that state courts—also agencies of the government—have jurisdiction of the controversy.

The very necessity for resort to the Courts of the United States—whether state or federal—emphasizes the intimate connection of the shipping operations involved with the economy of this nation. As the OEEC, *Study on the Expansion of the Flags of Convenience Fleet (1958)*, pointed out (at p. 11):

> "The extent to which shipowners, charterers, etc. have recourse to the courts of the flag state of the defendant probably reflects to a greater degree than most aspects of shipping the true relationships between the ship and her flag. Where a shipping company has no assets in the flag state, and the owners, directors and managers are not nationals, it is useless to have recourse to the courts in those

countries as they cannot enforce their decisions. It is significant that even the owners of vessels under flags of convenience prefer to have their disputes settled in the courts of the maritime countries."

Yet a further incongruity will result if Board jurisdiction is denied. On the one hand we will have this Court saying in *Marine Cooks* that protest picketing of foreign flag ships by the maritime unions is protected against injunctions by the *Norris-LaGuardia Act*, and, on the other hand, that the processes of the Board are unavailable to help resolve the disputes peacefully.

This incongruity will in turn breed inequities. For while the maritime unions will be denied access to the Board for the purpose of being certified as bargaining representatives, nothing will prevent ship operators or others on their behalf from using the facilities of the Board to file charges against the unions for secondary boycott activities or other violations of the Act, since any "person" may lodge a complaint against a union unfair practice. This is not mere speculation. In *Compania Maritima Samsoc, Ltd.*, CCH Lab. L. Rep., Par. 100081 (4th Ed. 1950), a maritime employer succeeded in persuading the Board that it did not have jurisdiction over an election petition filed by the union against his Liberian flag ship. However, when the union picketed, he procured a drydock owner to file charges against the picketing. *Moore Drydock Co.*, 92 NLRB 547 (1950). This incongruous result was pointed out by Mr. Justice Douglas in his dissent in the *Benz* case, 353 U. S. at 148.

Conclusion.

The opinion (R. 59-82) and judgment (R. 83) of the Court of Appeals for the Second Circuit, both dated January 12, 1962, reversing the order dated December 16, 1961 of the District Court for the Southern District of New York (R. 46-52), should be in all respects reversed, together with the order of the District Court dated February 15, 1962, making the mandate of the Court of Appeals the order of the District Court (R. 86-87); and the motion to dismiss the complaint (R. 45-46), by Ivan C. McLeod, as Regional Director of the Second Region of the National Labor Relations Board, dated December 13, 1961, should be granted.

Dated: October 4, 1962

Respectfully submitted,

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APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 72 Stat. 945, 946, 29 U. S. C. §141, *et seq.*) are as follows:

SECTION 1. • • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act——

• • • • • •

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

• • • • • •

SEC. 9. * * *

* * * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board——

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organi-

zation or its predecessor not issued in conformity with section 10(c).

* * * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining

order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of

title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618:

ARTICLE 10:

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

* * * * * *

ARTICLE 22:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

* * * * * *